Supreme Court, U.S.
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No. 99-1036

In The

Supreme Court of the United States

TREASURE CHEST CASINO, et al.,

Petitioners,

v.

DENNIS MULLEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review two discretionary decisions of the district court which were affirmed by the Court of Appeal: first, that a class consisting of approximately 150 Jones Act seamen injured aboard the same vessel possessed the requisite cohesiveness for certification under Rule 23(b)(3), Fed. R. Civ. P.; and, second, that a bifurcated trial plan was appropriate given the facts presented.

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STATEMENT OF THE CASE

Plaintiffs, members of the crew of the M/V TREASURE CHEST CASINO, filed this class action complaint in the United States District Court for the Eastern District of Louisiana pursuant to the Jones Act and the doctrine of unseaworthiness. The Complaint alleges that Defendant is liable to the Plaintiff Class because a defective and/or improperly maintained air-conditioning and ventilation system aboard the vessel caused respiratory illnesses among the members of the crew. The Class Representatives developed serious, chronic respiratory problems, and two of the three suffered respiratory attacks aboard the vessel which required hospitalization. *Mullen v. Treasure Chest, LLC*, (App. A to Petition), 186 F.3d 620, 623 (5th Cir. 1999). Medical experts testified as to the large number of illnesses among the crew and the common cause for those illnesses. *Id.* at 623 and 627.

On August 29, 1997, the District Court signed the Order and Reasons granting Plaintiff's motion to certify the class action pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure. (App. B to Petition). The class was defined as all members of the crew of the M/V TREASURE CHEST CASINO who suffered respiratory illnesses as a result of the defective or improperly maintained ventilation system aboard the vessel. By Order dated August 19, 1999, the Fifth Circuit Court of Appeal affirmed. *Mullen v. Treasure Chest, LLC*, 186 F.3d 620 (5th Cir. 1999).

Based upon a detailed review of a substantial record, both Courts below ruled that this case did not involve the

type of complex individual issues that have in the past led courts to deny certification.

> For example, in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Supreme Court found that common issues did not predominate where the members of the plaintiff class were exposed to asbestos-containing products from different sources over different time periods, some of the class members were asymptomatic while others had developed illnesses, and the class members were from a variety of states requiring the application of a multitude of different legal standards. See id. 117 S.Ct. at 2250 (citing Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (3d Cir. 1996)). Similarly, in Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), this Court found that a putative class of addicted smokers did not meet the predominance requirement because there were complex choice-of-law issues and the case involved novel addiction-as-injury claims with no track record from which a court could determine which issues were "significant." See id. at 741-45. Here, by contrast, the putative class members are all symptomatic by definition and claim injury from the same defective ventilation system over the same general period of time. Because all of the claims are under federal law, there are no individual choice-of-law issues. And, because negligence and doctrine-of-seaworthiness claims are time-tested bases for liability, the district court could reasonably evaluate the significance of the common issues without first establishing a track record.

Id. 626-627.

The Court of Appeal noted that for these reasons and the fact that the class would consist of only hundreds of members, instead of millions, class litigation in this case would not present the degree of managerial problems found in larger, more complex classes. *Id.* at 627.

The instant Petition is based largely on the incorrect assertion that the district court failed to adopt a trial plan. (Petition p. 5 and pp. 9-10). The record demonstrates that the district court did adopt a trial plan. The Court of Appeal did not create the trial plan or change the plan adopted by the district court. The panel clearly stated the parameters of the district court's plan:

> Under the court's plan, the liability issues common to all class members will be tried together in an initial trial phase. Those common issues include whether the employees of the Casino are seamen within the meaning of the Jones Act, whether the Casino is a vessel within the meaning of the Jones Act, whether the Casino was rendered unseaworthy by the air quality aboard, and whether Treasure Chest was negligent in relation to the Casino's ventilation system. If the class prevails on the common liability issues in phase one, the issues affecting only individual class members will be tried in a second phase in waves of approximately five class members at a time. These limited issues include causation, damages, and comparative negligence.

Mullen, 186 F.3d at 623.

Petitioner presents two alleged errors by the courts below. First, Petitioner complains of the decision to bifurcate the trial. Petitioner urges this Court to hold that the issues which have been bifurcated for trial are, in fact, too

intertwined to be tried separately. However, the decision of whether the bifurcated issues are separable is one of fact. Petitioner's position was considered and found unpersuasive by the two courts below after their exhaustive review of the record. This Court should not be an arbiter of such a fact-intensive inquiry. Second, Petitioner argues that the presence of certain individual issues among the class representatives should prevent certification. However, as quoted above, the courts below considered the cases relied upon by Petitioner on this point, but found the facts of this cohesive, narrow class to be far different. Petitioner's disagreement with these two factual determinations fuels this writ. Nowhere does the Petition allege that either court below failed to consider the requirements of Rule 23 or that the applicable law was misstated. Petitioner's supposed conflicts between circuits and decisions of this Court are nonexistent. Petitioner seeks nothing more than a third review of the factual record. That is not the function of this Court, and the Petition should be denied.

REASONS FOR DENYING THE WRIT

The role of this Court as one of law has been well-defined, as is its concomitant limits to consider the factual details of a complex record.

> . . . the function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. Our institutional role

> properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the application of law to the particularized facts of individual disputes – one of the functions performed quite capably by the federal courts of appeals.

U.S. v. Young, 470 U.S. 1, 34, 105 S.Ct. 1038, 1056 (1985) (BRENNAN, J., concurring in part and dissenting in part). See also, *United States v. Hasting*, 461 U.S. 499, 517, 103 S.Ct. 1974, 1984, 76 L.Ed.2d 96 (1983) (STEVENS, J., concurring in judgment); and *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568 (1985) (BRENNAN, J., dissenting).

This institutional role is given form through the rules of this Court which establish the grounds for granting a Writ of Certiorari. Petitioner apparently relies upon Rule 10(a) in asserting an alleged conflict between circuits and 10(c) in asserting that the decision conflicts with prior decisions of this Court on an important issue of federal law. Petitioner's efforts to make this into a conflict among circuits or with decisions of this court are unavailing. The review they seek is not one of law, but one of fact. There is no legal issue which requires resolution or correction by this Court; but rather, only a Defendant who disagrees with the manner in which the courts below balanced the common and individual issues in this case in granting certification and formulating a trial plan. The only errors alleged by Petitioner are errors of fact and misapplication of properly stated rules of law, which pursuant to Rule 10, should not require review by this Court.

A. The District Court Trial Plan Affirmed by the Court of Appeal Does Not Create a Conflict Between the Circuits

Petitioner asserts that the bifurcated trial plan violates its Seventh Amendment rights and prevents a finding that the class action is superior to other forms of adjudication as required by Rule 23(b)(3), Fed. R. Civ. P. Initially, this Court should not consider the Seventh Amendment issue because it was waived by Petitioner in the court below. The Court of Appeal found that Petitioner's Seventh Amendment argument was waived when not raised in either the district or circuit court. *Mullen*, 186 F.3d at 628. In fact, the Seventh Amendment was first mentioned not by Petitioner, but in dicta within the dissenting opinion.[1] Petitioner's rationale that it was not required to raise the argument below is incorrect. As mentioned above, contrary to Petitioner's brief, the bifurcated plan separating liability from causation and damages was included in the district court judgment and that plan was not altered by the Court of Appeal.[2] Because

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[1] Judge Garza dissented based on the superiority issue, mentioning the possibility of a Seventh Amendment question only briefly. The dissent stated that "having separate juries consider essentially the same issue ***may*** run afoul of the Seventh Amendment." *Id.* at 632. (emphasis added).

[2] Several references within both the majority and dissenting opinions make it clear that the district court set the trial plan and that none of panel members considered the Court of Appeals as having created the trial plan. "The district court held that the issues to be tried commonly . . . " *Mullen*, 186 F.3d at 626. " . . . explicit in the district court's decision is a finding that causation is a unique issue that will be resolved in the trial plan's second-phase . . . " *Id.* "The bifurcated trial plan, the court

there was no reason why it could not have been raised below, Petitioner waived the Seventh Amendment issue by not arguing it on appeal.[3]

Furthermore, even assuming the argument was not waived, Petitioner's argument that merely because the Seventh Amendment is implicated this Court should grant certiorari is not well-founded. Every class certification employing subclasses, partial certification of issues, or bifurcation inevitably implicates the Seventh Amendment. Petitioner would have this Court review every such class certification. The proper inquiry for this Court on this Petition is whether the courts below applied the proper law. Petitioner's dispute is not with the law, but with the courts below deciding that the issues in this case were separable and properly bifurcated. Such a decision is inherently fact-driven and not proper for review by this Court.[4]

The Court of Appeal noted that, "The Seventh Amendment does not prohibit bifurcation of trials as long

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found, would 'promote judicial economy . . . ' " *Id.* at 627. "In upholding the district court's bifurcated approach . . . " *Id.* at 631.

[3] In addition, Petitioner, as the defendant in the trial court, has no Seventh Amendment rights in this Jones Act/unseaworthiness case. *See, Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986); and, *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994).

[4] A decision ordering bifurcation is dependent on the facts and circumstances of each case. *Idzojtic v. Pennsylvania RR Co.*, 456 F.2d 1228 (3d Cir. 1972); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996).

as 'the judge [does] not divide issues between separate trials in such a way that the same issue is re-examined by different juries.' " *Mullen*, 186 F.3d at 628, citing *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 320 n. 50 (5th Cir. 1998), and quoting *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). The Court of Appeal applied that principle and found that under the facts of this case, the issues being considered by separate juries were not too intertwined, and that Phase I's decisions would not be re-examined.

> . . . [W]e would not find the risk of infringing upon the parties' Seventh Amendment rights significant in this case. In Castano, we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." Lewis v. Timco, Inc., 716 F.2d 1425, 1431 (5th Cir. 1983) (en banc) . . . The phase-two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the Casino unseaworthy, but only the degree to which those conditions were the sole or contributing cause of the class member's injury. . . . Because the first jury will not be considering any issues of causation, no Seventh

> Amendment implications affect our review of the district court's superiority finding.

Mullen, 186 F.3d at 628-629.

As with its Seventh Amendment claim, Petitioner's argument regarding the purported lack of superiority is likewise dependent upon their fact-based dispute that the issues in this case were not sufficiently separable for bifurcation. The courts below found that Phase I issues will not be re-examined. This factual finding, based upon the review of the record, is dispositive of Petitioner's superiority argument. As the courts below found, because the two phases will not be repetitive, class litigation will be far more efficient and superior to other forms of litigation. As is apparent, the correct law was applied by the courts below. The fact that Petitioner does not like the result is not grounds for granting certiorari.

With respect to the Seventh Amendment and superiority issues raised, Petitioner claims that the decision of the court below is in conflict with the decision rendered by the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (ordering decertification because of improperly bifurcated trial plan). However, the Court of Appeal's opinion in this case applied the same legal standard as *Rhone-Poulenc*, but presented with very different facts, concluded the issues herein could be bifurcated. The factual differences between the cases do not create a conflict among the circuits.

Rhone-Poulenc was a proposed class action filed by hemophiliacs against several suppliers of various blood products. 51 F.3d at 1294. The proposed class literally involved an entire industry and a wide range of products,

and the presence of novel theories of liability greatly complicated efforts to formulate a trial plan. *See, In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 461 (D. Wyo. 1995) (discussing *Rhone-Poulenc*). Because of these unique considerations, later courts have noted that *Rhone-Poulenc* should be limited to the peculiar facts before the court. *Copley*, 161 FRD at 460; and *In re Teletronics Pacing Systems, Inc.*, 168 FRD 203, 209-210 (S.D.Ohio 1996). In the instant case, the Fifth Circuit agreed with the law applied in *Rhone-Poulenc*. The majority included citation to *Rhone-Poulenc* with regard to the applicable legal analysis under the Seventh Amendment. *Mullen*, 186 F.3d at 628. However, in the instant case, the Court of Appeal found that, unlike in *Rhone-Poulenc*, the record indicated that issues could be separated appropriately for the bifurcated trial plan. There is no conflict among the circuits on how to handle the Seventh Amendment issue. There are simply two decisions which reached different results under different facts. A comparison of the factual complexities of *Rhone-Poulenc* and *Mullen* is a task for which the courts below, familiar with the entire record, were more well-suited.

B. The Findings of Courts Below Regarding Predominance and Adequacy of Representation Do Not Conflict with Prior Decisions of this Court

Petitioner contends that because the Plaintiffs describe different ways in which the ventilation system failed to work properly, it is impossible for common issues to predominate or for the named plaintiffs to be adequate representatives of the class. The courts below addressed this argument and found it unpersuasive.

> We find no merit in Treasure Chest's argument. First, Treasure Chest overstates the importance of the Named Plaintiffs' conjecture regarding their own illnesses. . . . As lay witnesses, however, the Named Plaintiffs' opinions about the possible causes of their own respiratory conditions are of negligible evidentiary weight and probably would not be admissible at trial. . . . The medical experts already deposed in this case have unwaveringly cited excessive second-hand smoke as the most likely Casino-related factor to have exacerbated or caused the putative class members' respiratory problems.

Id. at 627.

The district court and the majority of the Court of Appeal found that statements by the class representatives were not entitled to substantial evidentiary weight. Both courts below held that the common issues were significant in relation to the individual issues and were independently sufficient to establish commonality, making it irrelevant whether the class members uniformly allege damages from second-hand smoke. *Id.* at 625. In short, the commonality upon which the class was certified was the unseaworthy and negligently maintained and designed vessel. Both courts weighed the evidence and were not persuaded that the differing complaints would prevent efficient resolution of the common issues through class litigation.

Judge Garza's dissent, rather than giving the appropriate deference to the weighing of the evidence made by the district court, simply chose to give more weight to lay opinions than did the district court or majority below. *Id.* at 631. In this regard, the dispute over the weight of the

evidence in the record is not an issue this Court should decide. Moreover, as demonstrated by the majority, the dissent, in addition to failing to give deference, improperly relied on inadmissible lay opinion over unanimous expert opinion.

Petitioner claims that, due to the differing complaints, certification in this case conflicts with the decisions of this Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 65 U.S.L.W. 4635 (1997), and *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), but again, Petitioner makes no allegation of an error of law. Petitioner seeks review only as to the finding of the courts below that, because the seamen on this one vessel possessed greater commonality, the case was factually distinguishable from the sprawling mega-classes disapproved of by this Court. (The Court of Appeal's discussion distinguishing *Amchem* is excerpted at p. 2, *supra*). In the end, the decision of whether common issues predominated was a discretionary call by district court approved by the Fifth Circuit. *Mullen*, 186 F.3d at 626-627. Granting this Writ in order to re-weigh the predominance of common issues would require this Court to review the entire record, and perhaps more importantly, to remove the flexibility given the trial court in administering class actions under Rule 23, Fed. R. Civ. P.

Finally, even if these various statements regarding smoke, dust mites, fumes, etc., are later proved by more substantial, competent evidence, the trial court can always make provisions to handle the situation. As pointed out by the circuit court, the trial court could accomplish this by instructing the jury to answer special

verdicts as to each alleged causal agent, i.e., tobacco smoke, dust mites, fungi, paint fumes, et cetera.

> The court can then properly limit the injuries for which the phase-two juries could find Treasure Chest liable. Thus, if the phase-one jury were to find that Treasure Chest was negligent as to tobacco smoke but not as to paint fumes, any class member whose injuries were found by a phase-two jury to be caused by paint fumes would be unable to recover.

Id. at 627-628.

Contrary to Petitioner's position, the Court of Appeal did not create or modify the trial plan by making this suggestion. The Fifth Circuit was merely pointing out the district court's ability (and duty) under Rule 23 to monitor its class decisions in light of the evidentiary development of the case. As this Court has noted, "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372 (1982). *See also, Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527 (1983); *Miera v. First Sec. Bank of Utah, N.A.*, 925 F.2d 1237, 1242 (10th Cir. 1991); *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 226 (D.C.Cir. 1981); and, *Kuehner v. Heckler*, 778 F.2d 152, 163 (3rd Cir. 1985).

CONCLUSION

The complaints lodged by Petitioner herein all involve issues over which the trial judge is given great discretion. In addition, the Court of Appeal, upon reviewing the extensive record of the case, agreed with the district court's weighing of the evidence and application of class action rules and jurisprudence. As such, this Court should be reluctant to review, for a third time, evidence which two other tribunals has found sufficient to meet class action requirements. As this Court has previously noted:

> The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task. . . . "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Goodman v. Lukens Steel Co., 482 U.S. 656, 665, 107 S.Ct. 2617, 2623 (1987), quoting *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949).

The inquiry sought herein is far too fact intensive, and the scope of the decision below is far too parochial, to require review by this Court. Petitioner's desire to have this Court determine the correctness of the class certification and trial plan does not substitute for the lack of any conflict between the circuits or with the decisions

of this Court. The courts below expressed no disagreement with the law as announced by *Rhone-Poulenc*, *Ortiz*, or *Amchem*; rather, they simply found this relatively small, tightly-knit class to be distinguishable from those larger, more complicated cases which were found to be improper for class treatment. For these reasons, the Petition should be denied.

Respectfully submitted,

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